86 1372

Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the

Supreme Court of the United States

October Term, 1986

CARLOS MANUEL SOBERATS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

STEVEN WISOTSKY
Nova University Law Center
3100 Southwest 9th Avenue
Ft. Lauderdale, FL 33315
(305) 760-5734
Counsel for Petitioner

QUESTION PRESENTED

Whether application below of the Florida contemporaneous objection rule violated *Henry v. Mississippi*, 379 U.S. 443 (1965), by preventing Petitioner from appealing the denial of his pretrial motion to suppress evidence seized in violation of the Fourth Amendment even though Petitioner's counsel objected at trial to admission of the evidence on non-constitutional grounds.

THE PARTIES TO THE PROCEEDING BELOW

The proceeding below was a criminal appeal. The parties were Petitioner Carlos Manuel Soberats, appellant below, and Respondent State of Florida, appellee below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
THE PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF AUTHORITIES	v
DECISION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
A. THE DECISION BELOW CONFLICTS WITH *HENRY v. MISSISSIPPI*, 379 U.S. 443 (1965), IN APPLYING THE FLORIDA CONTEMPORANEOUS OBJECTION RULE TO BAR APPELLATE REVIEW OF THE DENIAL OF PETITIONER'S PRETRIAL MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE WHERE DEFENSE COUNSEL OBJECTED AT TRIAL TO ADMISSION OF THAT EVIDENCE ON OTHER GROUNDS	5

TABLE OF CONTENTS (Continued)

Page

B. IN THE TWENTY-TWO YEARS SINCE THIS COURT DECIDED *HENRY v. MISSISSIPPI*, NO REPORTED FLORIDA CASE HAS EVER CITED IT AND FLORIDA COURTS PAY NO RESPECT TO ITS PRINCIPLE 12

CONCLUSION 13

APPENDIX 15

TABLE OF AUTHORITIES

Cases:	Page
Armbruster v. State, 453 So.2d 833 (Fla. 4th DCA 1984)	6
Bonham v. State, 450 So.2d 269 (Fla. 3d DCA 1984)	6, 13
Davis v. Wechsler, 263 U.S. 22 (1923)	12
DeLuca v. State, 384 So.2d 212 (Fla. 4th DCA 1980)	6
Douglas v. Alabama, 380 U.S. 415 (1965)	11
Henry v. Mississippi, 379 U.S. 443 (1965)	*passim*
Henry v. State, 154 So.2d 289 (Miss. 1963)	10
James v. Kentucky, ____ U.S. ____, 104 S.Ct. 1830 (1984)	11
Jones v. State, 360 So.2d 1293 (Fla. 3d DCA 1978)	6, 7
Palmore v. Sidoti, 466 U.S. 431 (1984)	5
Parker v. State, 456 So.2d 436 (Fla. 1984)	6

TABLE OF AUTHORITIES (Continued)

Cases: **Page**

Rice v. Sioux City Cemetery,
349 U.S. 70 (1955) 13

Roban v. State,
384 So.2d 683 (Fla. 4th DCA 1980) 6, 7

Rodriguez v. State,
433 So.2d 1273 (Fla. 3d DCA 1983) 7

Russell v. State,
270 So.2d 462 (Fla. 3d DCA 1972) 6

Staub v. City of Baxley,
355 U.S. 313 (1958) 11

Stone v. Powell,
428 U.S. 465 (1976) 10

Wainwright v. Sykes,
433 U.S. 72 (1977) 10

Whipple v. State,
431 So.2d 1011 (Fla. 2d DCA 1983) 9

Williams v. Florida,
399 U.S. 78 (1970) 5

OTHER:

Florida Constitution, Article V, § 3(b)(3) 5

NO.

in the

Supreme Court

of the

United States

October Term, 1986

CARLOS MANUEL SOBERATS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

Petitioner Carlos Manuel Soberats respectfully prays that a writ of certiorari issue from this Court to

review the judgment of the Florida Fifth District Court of Appeal entered on December 23, 1986.

DECISION BELOW

The judgment of the Florida Fifth District Court of Appeal consists of the three words "Per Curiam Affirmed." It will be "reported" in the Southern Reporter, 2d series as an unpublished opinion. It is reproduced in the Appendix.

JURISDICTION

The decision of the Court of Appeal was rendered on December 23, 1986. This petition has been filed within 60 days of that date pursuant to 28 U.S.C. §2101(d) and Supreme Court Rule 20.1. The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

At approximately 5:30 p.m. on July 24, 1985, Officer Towles Bigelow of the Marion County Sheriff's Department was in his marked patrol car when he received a BOLO for a green car occupied by a red-shirted male driving eastbound on Highway 40. (R. 171-72). Acting solely on the BOLO, he stopped Petitioner Soberats' car. (R. 205). He had no other knowledge of the Ernst-Johnson cocaine conspiracy investigation then in progress some six miles away. (R. 205). His check of Petitioner's license and rental car documents revealed nothing suspicious. He had observed no traffic violation. (R. 207). He detained Petitioner pending arrival of other officers. (R. 219).

Receiving Bigelow's radio transmission that he had stopped a green car fitting the BOLO, Sgt. McQuaig and Officer John Kost drove to the scene. Neither man had ever seen Petitioner or his car. Nor had any officer heard Soberats' name in connection with the Ernst-Johnson investigation. Officer McAvay, who had seen the Soberats car leave the Johnson ranch and who had issued the BOLO, was not called to the scene to make an identification. (R. 226). Based solely on his general knowledge of the Ernst-Johnson cocaine investigation, Sgt. McQuaig "felt that this was without a doubt the man that was supposed to come pick up the cocaine." (R. 219).

McQuaig's request for consent to search was refused by Soberats. (R. 219). McQuaig responded that he had probable cause to search his vehicle "due to the circumstances". (R. 220). He then opened a briefcase on

the back seat of Soberats' car. It had a package that field-tested positive for cocaine. (R. 220). Soberats was arrested after the search. (R. 223).

Petitioner was charged with trafficking in cocaine. On February 20, 1986, defense counsel filed a pretrial motion to suppress the cocaine as illegally seized evidence. (R. 776). At the conclusion of the evidentiary hearing on the motion to suppress, defense counsel argued that the initial stop was unlawful and that, irrespective of the validity of the initial stop, there was no probable cause to search. (R. 230-31). The Court denied the motion to suppress without any findings. (R. 240). At trial, Petitioner objected to admission of the cocaine on other grounds. (T. 153). The objection was overruled. (T. 153). Petitioner was convicted of trafficking in cocaine. The Court sentenced him to the mandatory minimum of 15 years in prison and fined him $250,000.00. (R. 795-98).

On appeal, Petitioner raised two issues--the denial of the motion to suppress the cocaine and the granting of the state's motion for forfeiture. Brief of Appellant at 10. The State argued that Petitioner was barred from appealing the Fourth Amendment issue as a result of failing to object on that ground when the cocaine was offered into evidence at trial. Brief of Appellee at 7. The Fifth District Court of Appeal affirmed per curiam without opinion. Certiorari is sought to review that decision.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW CONFLICTS WITH *HENRY v. MISSISSIPPI*, 379 U.S. 443 (1965), IN APPLYING THE FLORIDA CONTEMPORANEOUS OBJECTION RULE TO BAR APPELLATE REVIEW OF THE DENIAL OF PETITIONER'S PRETRIAL MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE WHERE DEFENSE COUNSEL OBJECTED AT TRIAL TO ADMISSION OF THAT EVIDENCE ON OTHER GROUNDS

The writ should be granted under Supreme Court Rule 17.1(c) because the decision of the Florida Fifth District Court of Appeal[1] conflicts with this Court's decision in *Henry v. Mississippi*, 379 U.S. 443 (1965). Although the per curiam affirmance without opinion of the court below offers no explicit guidance, Florida law permitted only one possible ground of decision: the Florida contemporaneous objection rule posed an absolute bar to appellate review in this case.

The only issue on appeal going to the validity of Petitioner's conviction was his claim of an unlawful

---

[1]This Court may exercise its certiorari jurisdiction to review decisions of a state intermediate court of appeal when it is the highest state court in which review could be had. *Williams v. Florida*, 399 U.S. 78, 80 n. 5 (1970). The Florida Constitution was amended in 1980 to deny to the Florida Supreme Court jurisdiction to review by certiorari per curiam decisions of the district courts of appeal rendered without opinion. Fla. Const., Art. V, § 3(b)(3). *Palmore v. Sidoti*, 466 U.S. 431 (1984).

search and seizure under the Fourth Amendment. Brief of Appellant at 10. (The second issue on appeal challenged the court's forfeiture of his bond.) The State of Florida countered that the search and seizure issue was not properly preserved for appellate review:

> It is well established that the failure to renew an objection at trial contemporaneously with the admission of evidence which has been the object of a previous unsuccessful motion to suppress waives any claim of error in regard to the admission of such evidence or prior ruling. *See, Jones v. State,* 360 So.2d 1293 (Fla. 3d DCA 1978); *DeLuca v. State,* 384 So.2d 212 (Fla. 4th DCA 1980); *Bonham v. State,* 450 So.2d 269 (Fla. 3d DCA 1984); *Parker v. State,* 456 So.2d 436 (Fla. 1984). This principle applies in instances where, although a pretrial motion to suppress evidence has been made, and denied, objection is interposed to the admission of the evidence on other grounds. *See, Roban v. State,* 384 So.2d 683 (Fla. 4th DCA 1980); *Armbruster v. State,* 453 So.2d 833 (Fla. 4th DCA 1984); *Russell v. State,* 270 So.2d 462 (Fla. 3d DCA 1972). . . . At the time that the evidence seized from the car. . . was introduced, appellant only objected to such admission on the grounds of insufficient showing of chain of custody or, arguably, relevance (R. 356-362). Absolutely nothing was said at the time in regard to the prior search and seizure argument. On the basis of the above precedent, especially *Russell,* appellee would contend that appellant has failed to preserve any issue regarding the denial of his

> motion to suppress evidence, and that, consequently, the instant conviction should be affirmed.

Brief of Appellee at 6-7. The State was clearly correct in this waiver argument.

Florida law on the contemporanaeous objection rule is crystal clear: if at trial defense counsel fails to object or objects solely on non-constitutional grounds, that constitutes a waiver of appellate review even "though issues of constitutional dimension are claimed to exist." *Jones v. State,* 360 So.2d 1293, 1296 (Fla. 3d DCA 1978). See cases cited in *Rodriguez v. State,* 433 So.2d 1273, 1275 (Fla. 3d DCA 1983).

For example, in *Roban, supra,* the defendants lost a pretrial motion to suppress marijuana on Fourth Amendment grounds. At trial when the contraband was offered into evidence, the defense objected on chain-of-custody and other non-constitutional grounds. The appellate court held that the Fourth Amendment issue had not been preserved for review:

> The grounds of the objection made when the contraband was offered into evidence at the trial were not the same as those relied upon during the motion to suppress. That constitutes a waiver of those grounds relied upon during the suppression hearing.

Id. at 684.

Roban is a case on all fours with Petitioner's case as it stood in the court below. His pretrial motion to

suppress evidence on fourth amendment grounds had been denied by the trial judge. At trial, when the cocaine was offered into evidence by the State, defense counsel objected in the following terms:

> [By Crime Lab Analyst]:
>
> > I found each of the vials to contain cocaine.
>
> BY MR. FUTCH:
>
> > . . . I would offer this in as State's next sequentially numbered exhibit for evidentiary purposes.
>
> BY MR. FITOS [defense counsel]:
>
> > Objection, Your Honor; insufficient predicate, based upon her testimony as to what she did with the testing, what she could have done in addition to that, and we would object to the admission.
>
> BY THE COURT:
>
> > Overruled and admitted.

Defense counsel did not at that time repeat the fourth amendment grounds that had been argued on the pretrial motion to suppress. That omission was fatal to appellate review under Florida law.

It is thus clear beyond all argument that the Fifth District Court of Appeal had absolutely no choice but to conclude that Soberats had waived his right to appellate review of his fourth amendment claim as a result of counsel's failure to comply with the contemporaneous objection rule. With no other issue on appeal directed to the conviction, affirmance was the only possible outcome.

For the same reason, issuance of a per curiam affirmance without opinion was a foregone conclusion. Indeed, it was virtually mandated. In the face of such overwhelming unanimous precedent against appellant, the writing of an opinion would have been inappropriate. *Whipple v. State,* 431 So.2d 1011 (Fla. 2d DCA 1983). Law and practice dictated a per curiam affirmance without opinion.

The fact that Florida law is so clear and unambiguous does not of course mean that it is constitutionally valid. On the contrary, Florida's contemporaneous objection rule conflicts quite obviously with this Court's decision in *Henry v. Mississippi,* 379 U.S. 443, 447 (1965): "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. If it does not, the State procedural rule ought not be permitted to bar vindication of important federal rights."

In *Henry,* the Court observed that the Mississippi contemporaneous objection rule did serve the legitimate state interest of giving the court an "opportunity to conduct the trial without using the tainted evidence."

Id. at 448. No pretrial motion to suppress was required under Mississippi practice. *Henry v. State,* 154 So.2d 289, 295 (Miss. 1963). Nevertheless, the court thought that the purpose of the rule may have been substantially served by Henry's motion for a directed verdict at the close of the state's case.

The logic of *Henry* is even more compelling against the Florida rule. No legitimate state interest is served by applying Florida's contemporaneous objection rule after a pretrial motion to suppress has already afforded the state the "opportunity to conduct the trial without using the tainted evidence." *Henry v. Mississippi, supra* at 448. Furthermore, unlike *Henry,* Petitioner objected again at trial to admission of the illegally seized evidence. The fact that his trial objection was based on non-constitutional grounds stongly suggests either counsel's common sense avoidance of beating a dead horse or perhaps ignorance of the rule's disastrous consequences for appellate review.

This case is more compelling than *Henry* in a second respect. Counsel's failure to reiterate the fourth amendment ground cannot, as in *Henry* at 450-52, be construed as an intentional waiver of the objection by deliberately bypassing it as part of trial strategy. On the contrary, defense counsel tried to keep the cocaine out of evidence when it was offered by the State. (T. 153). By the same token, there was no "sandbagging" by defense counsel, *Wainwright v. Sykes,* 433 U.S. 72, 89 (1977) in hopes of a later chance of raising the issue. Nor could there be any such possibility in light of *Stone v. Powell,* 428 U.S. 465 (1976), barring federal habeas corpus review of claimed fourth amendment violations in state prosecutions.

In these circumstances, it is impossible to conceive of *any* legitimate state interest underlying Florida's rigid requirement that defense counsel mouth the words "fourth amendment" when he objects to the illegally seized contraband being introduced at trial. After all, the illegal search and seizure had already been the subject of an evidentiary hearing that filled 99 pages of transcript. The factual and legal issues had been fully explored during the pretrial motion to suppress. It is fatuous to conjecture that the very trial judge who had denied the motion to suppress would be moved to reverse his ruling by the mere invocation of two words added to counsel's other grounds of objection at trial. Rather, Florida is "requiring repetition of a patently futile objection," *Douglas v. Alabama*, 380 U.S. 415, 422 (1965). In the context of this case the rule is an empty formalism, contrary to the teaching of *James v. Kentucky*, ____ U.S. ____, 104 S.Ct. 1830, 1835 (1984), that courts should not "force resort to an arid ritual of meaningless form," citing *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958).

Petitioner took every practical and meaningful step to exclude the unlawfully seized evidence from trial. He filed a pretrial motion to suppress the evidence on fourth amendment grounds. Having lost that motion, he logically confined his trial objection to admission of the evidence to other grounds. His failure to repeat the words "fourth amendment" at trial after losing that issue on the pretrial motion to suppress "cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case." *Henry* at 449.

It would be unconscionable to condemn a man with a meritorious motion[2] to suppress illegally seized evidence to serve 15 years in prison without parole because of his counsel's non-compliance with an "arid ritual." As Justice Holmes put the matter, "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler,* 263 U.S. 22, 24 (1923).

B. IN THE TWENTY-TWO YEARS SINCE THIS COURT DECIDED *HENRY v. MISSISSIPPI,* NO REPORTED FLORIDA CASE HAS EVER CITED IT AND FLORIDA COURTS PAY NO RESPECT TO ITS PRINCIPLE

A final reason for granting the writ transcends the injustice done to Petitioner as an individual. The Florida courts are apparently wholly ignorant of this Court's decision in *Henry v. Mississippi.* Examination of the volumes of Shepard's United States Citations (Cases) through January 1987, containing hundreds of citations, reveals not a single Florida case citing *Henry* or following its rationale. On the contrary, the following

---

[2]The substance of the motion to suppress is that the Marion County Sheriff's Department had resolved to search every vehicle entering or exiting Sammy Johnson's house, which they had under surveillance as a suspected site of a cocaine conspiracy. Their suspicion was based on the uncorroborated claim of Brian Ernst who was not an informant and had no track record with the police. The record shows that police had never heard of Soberats, had no description of him or his car, and stopped and searched him solely because he drove out of the Johnson ranch, as did a black jeep that police also stopped. Under these circumstances the argument against probable cause for the search is strong.

statement typifies Florida law and practice: "we find no merit in, and certainly no support for, the defendants' contention that an exception to this well settled rule exists where the pretrial motion to suppress is heard and decided immediately before the commencement of trial." *Bonham v. State,* 450 So.Sd 269 (Fla. 3d DCA 1984). Apparently, word of this Court's 1965 decision has not yet penetrated the provinces. Granting the writ will have the salutary effect of disseminating a critical constitutional protection and thus serve "special and important reasons." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1955).

CONCLUSION

The decision below squarely conflicts with *Henry v. Mississippi* and exemplifies universal non-compliance by the Florida courts. For these reasons, the Court should grant the petition for writ of certiorari and remand the case to the Florida Fifth District Court of Appeal for a ruling on the merits of petitioner's fourth amendment claim that the trial court erred in denying his pretrial motion to suppress unlawfully seized evidence.

Respectfully submitted,

STEVEN WISOTSKY
Nova University Law Center
3100 Southwest 9th Avenue
Fort Lauderdale, FL 33315
(305) 760-5734

Counsel for Petitioner

February 19, 1987

Appendix

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
DECISION OF FLORIDA FIFTH DISTRICT COURT OF APPEAL	A-2
BRIEF OF APPELLANT, TABLE OF CONTENTS	A-4
TRIAL COURT HEARING ON MOTION TO SUPPRESS	A-6

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA FIFTH DISTRICT

JULY TERM 1986

[NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF]

CASE NO. 86-692

CARLOS MANUEL SOBERATS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Decision filed December 23, 1986

Appeal from the Circuit Court
from Marion County,
Carven D. Angel, Judge.

Carlos A. Rodriguez,
of Law Offices of
Carlos A. Rodriguez,
Miami, for Appellant.

Jim Smith, Attorney General,
Tallahassee, and Richard B. Martell,
Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

UPCHURCH, CJ., ORFINGER and COWART, JJ., concur.

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	i-iv
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2-9
SUMMARY OF ARGUMENT	10-11
ARGUMENT	
ISSUE I	
THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE ILLEGALLY SEIZED	12-14
A. Insufficient Probable Cause Under the Totality-of-Circumstances	13-33
1) Reliability of the Information was Insufficient for Probable Cause Under the Totality-of-Circumstances Test ..	15-25
2) The Observations of the Law Enforcement Officers do not Establish Probable Cause	25-33
B. Even Under Florida Stop and Frisk Law the Officer did not have the Founded Suspicion to Stop and Search Appellant's Vehicle	34-47

ISSUE II

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF FORFEITURE 48-50

CONCLUSION 51

CERTIFICATE OF SERVICE 51

[BRIEF OF APPELLANT]

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR MARION COUNTY.
CRIMINAL ACTION.

CASE NO. 85-1683-CF-A

STATE OF FLORIDA,

Plaintiff,

vs.

CARLOS MANUEL SOBERATS,

Defendant.

PROCEEDINGS:
Hearing on Motion to Suppress

BEFORE:
The Honorable Carven D. Angel
Circuit Judge
Fifth Judicial Circuit of Florida
Marion County Courthouse
Ocala, Florida

DATE AND TIME:
February 27, 1986, 1:00 p.m.

PLACE:
In Chambers
Marion County Courthouse
Ocala, Florida

REPORTED BY:
Charles E. Brandies, RPR, CSR,
Official Court Reporter
Fifth Judicial Circuit of Florida
Post Office Box 927
Ocala, Florida 32678

APPEARANCES:
John E. Futch, Esq.
Assistant State Attorney
Fifth Judicial Circuit of Florida
County Office Building
Ocala, Florida 32670
Attorney for Plaintiff

Jeffrey J. Fitos, Esq.
One Northeast Silver Springs Blvd.
Ocala, Florida 32670
Attorney for Defendant

* * *

contraband in the vehicle was in the containers. All they had reason to believe, Judge, one, was not that the contraband was in the briefcase found on the back seat but that it merely was contained somewhere within the vehicle. That's the Vathis decision and it stands for the propositions that I have recited for the Court.

BY THE COURT: I'll deny the request for a Richardson inquiry and also deny the Motion to Suppress.

BY MR. FUTCH: Thank you, Your Honor.